

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

STEVEN NELSON MURRAY,

Petitioner,

vs.

BRIAN E. WILLIAMS, *et al.*,

Respondents.

Case No. 2:12-cv-02212-RFB-VCF

**ORDER**

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner. Before the Court is petitioner's motion for a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). (ECF No. 32).

By order filed January 22, 2014, this Court granted respondents' motion to partially dismiss the petition. (ECF No. 23). The Court ruled that the following grounds of the federal habeas petition are unexhausted: (1) ground I(H); (2) the portion of ground II(A) that alleges ineffective assistance of appellate counsel for failure to raise a claim regarding the "illegal stipulation to procedure" on direct appeal; (3) ground III(B). A federal court cannot entertain a petition for a writ of habeas corpus unless the petitioner has exhausted available and adequate state court remedies with respect to each of the claims contained in the petition. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). In the case of a "mixed" petition containing both exhausted and unexhausted claims, petitioner has the following options: (1) He may submit a sworn declaration voluntarily abandoning the unexhausted claims in his federal habeas petition, and proceed only on the exhausted claims; (2) he may return to state court to exhaust his unexhausted claims, in which case his federal habeas

petition will be denied without prejudice; or (3) he may file a motion asking this court to stay and abey his exhausted federal habeas claims while he returns to state court to exhaust his unexhausted claims. *See Rose v. Lundy*, 455 U.S. at 510; *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009). The Court gave petitioner these options for dealing with his unexhausted claims in the order of January 22, 2014. (ECF No. 23, at pp. 10-12).

Petitioner has filed a motion for a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). (ECF No. 32). Respondents oppose petitioner's motion. (ECF No. 33). Petitioner has filed a reply to the opposition. (ECF No. 36).

In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court placed limitations upon the discretion of the court to facilitate habeas petitioners' return to state court to exhaust claims. The *Rhines* Court stated:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

*Rhines*, 544 U.S. at 277. The Court in *Rhines* went on to state that, "[I]t likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278. The United States Supreme Court has also stated that: "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' to excuse his failure to exhaust." *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (citing *Rhines*, 544 U.S. at 278).

In the instant case, petitioner's federal petition is undisputedly a mixed petition. Petitioner has demonstrated good cause under *Rhines* for the failure to exhaust all grounds of the federal petition prior to filing it. Further, the grounds of the federal petition that petitioner seeks to exhaust

1 in state court are not “plainly meritless” under the second prong of the *Rhines* test. Finally, there is  
2 no indication that petitioner engaged in dilatory litigation tactics. The Court has considered and  
3 rejected respondents’ points in opposition to petitioner’s motion for stay. This Court concludes that  
4 petitioner has satisfied the criteria for a stay under *Rhines*. Petitioner’s motion for a stay and  
5 abeyance of this federal habeas corpus proceeding is granted.

6 **IT IS THEREFORE ORDERED** that petitioner’s motion for issuance of stay and  
7 abeyance (ECF No. 32) is **GRANTED**.

8 **IT IS FURTHER ORDERED** that this action is **STAYED** pending exhaustion of the  
9 unexhausted claims. Petitioner may move to reopen the matter following exhaustion of the claims.

10 **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner filing a  
11 state post-conviction petition or other appropriate proceeding in state court to exhaust his  
12 unexhausted claims within **forty-five (45) days** from the entry of this order and returning to federal  
13 court with a motion to reopen the case within **forty-five (45) days** of issuance of the remittitur by  
14 the Supreme Court of Nevada at the conclusion of the state court proceedings.

15 **IT IS FURTHER ORDERED** that as a condition of the stay, petitioner shall exhaust all of  
16 his unexhausted claims in state court during the stay of this action.

17 **IT IS FURTHER ORDERED** that this action shall be subject to dismissal upon a motion  
18 by respondents if petitioner does not comply with the time limits in this order, or if he otherwise  
19 fails to proceed with diligence during the stay imposed pursuant to this order.

20 **IT IS FURTHER ORDERED** that the Clerk shall **ADMINISTRATIVELY CLOSE** this  
21 action, until such time as the Court grants a motion to reopen the matter.

22 Dated this 31<sup>st</sup> day of March, 2015.

23  
24 

25 RICHARD F. BOULWARE, II  
26 UNITED STATES DISTRICT JUDGE  
27  
28